BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHERYL THATCHER	)	
Claimant	)	
VS.	)	
	)	Docket No. 237,168
NURSEFINDERS	)	
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the January 9, 2001 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument in Wichita, Kansas, on July 13, 2001.

APPEARANCES

David H. Farris of Wichita, Kansas, appeared for claimant. Richard J. Liby of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a June 27, 1998 accident at work. Claimant alleges she is entitled to compensation for injuries to the right leg, right hip and back. Conversely, respondent and its insurance carrier contend claimant injured her right leg only.

In the January 9, 2001 Award, the Judge found in claimant's favor and awarded claimant a 72.5 percent work disability (a disability greater than the whole body functional impairment rating) through October 2, 2000, followed by a 56.5 percent work disability. The Judge also found that a post-injury wage of $91 per week should be imputed to

calculate claimant's wage loss for purposes of determining her work disability and that the medical treatment claimant obtained from Dr. Alan Brewer was unauthorized treatment.

Respondent and its insurance carrier contend Judge Barnes erred. They argue that claimant should receive permanent disability benefits for an injury to the right leg as provided by the "scheduled injury" statute.[1] They also argue that claimant has failed to make a good faith effort to find appropriate work and, therefore, a post-injury wage of $320 to $360 should be imputed, thereby limiting claimant's permanent partial general disability to the functional impairment rating.[2] Finally, they argue that claimant sustained no task loss as the result of her work-related accident and, in the alternative, had a 40.3 percent task loss at most.

On the other hand, claimant contends the permanent partial general disability rating should be increased. Claimant argues that she has a 100 percent wage loss and a 55 percent task loss. Claimant also contends that Dr. Brewer's medical services should be paid as authorized medical expense.

The issues before the Board on this appeal are:

1. Is claimant entitled to benefits for a "scheduled injury" to the right leg only as provided by K.S.A. 1997 Supp. 44-510d, or benefits for an "unscheduled injury" as provided by K.S.A. 1997 Supp. 44-510e?

2. If claimant is entitled to receive benefits as provided by K.S.A. 1997 Supp. 44-510e, what is claimant's post-injury wage for purposes of the permanent partial general disability formula and what is the percentage of claimant's task loss?

3. Was the medical treatment provided by Dr. Alan Brewer authorized or unauthorized treatment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. The January 9, 2001 Award should be modified to reduce claimant's task loss to 42 percent.

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[1] K.S.A. 1997 Supp. 44-510d.

[2] Claimant's average weekly wage for the date of accident is $286.46. Therefore, imputing a post-injury wage of $320 to $360 would result in no wage loss and no work disability according to the Board's interpretation of K.S.A. 1997 Supp. 44-510e and the Board's interpretation of the appellate court opinions that have addressed that statute.

2. The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of employment with respondent on June 27, 1998. On that date claimant was working as a certified nurse's assistant at a nursing home and fell, landing on her right knee before falling backwards, with her buttocks landing on her heel. After the accident claimant began receiving medical treatment for the right knee, including right knee surgery. During the time that claimant participated in physical therapy, she began experiencing symptoms in her groin, right hip and low back.

3. The Board finds that it is more probably true than not that claimant injured her right knee in the June 1998 accident. The Board also finds that claimant later developed right hip and back symptoms as a direct result of the right knee injuries sustained in the accident. That conclusion is supported by the testimonies of Dr. Alan Brewer, Dr. C. Reiff Brown, Dr. Pedro A. Murati and the medical report of Dr. Scott Jahnke.

Dr. Brewer, who is a board certified anesthesiologist with the Kansas University Medical Center and who treated claimant from April 1999 through September 1999, diagnosed claimant as having early stages of arthritis in the right knee and bilateral piriformis syndrome with sacroiliitis that probably developed from walking in such a manner as to attempt to take pressure off the injured right knee. The doctor also indicated in his October 1, 1999 letter to claimant's attorney that it was quite possible and even probable that the bilateral sciatic type pain claimant developed was secondary to the initial fall.

Dr. Brown, who is a board certified orthopedic surgeon, was hired by claimant's attorney for an evaluation. Dr. Brown examined claimant in August 2000 and found that claimant's back, which the doctor believes had preexisting degenerative changes, was aggravated by an altered gait that claimant developed as a result of the right knee injury. Dr. Brown rated claimant's whole body functional impairment at eight percent using the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*).

Dr. Murati, who is board certified in physical medicine and rehabilitation and board certified as an independent medical examiner, was also hired by claimant's attorney to provide an opinion in this claim. The doctor examined claimant in December 1998 and diagnosed claimant as having, among other things, right knee pain and right thigh atrophy secondary to patellar femoral syndrome, trochanteric bursa and low back pain with right L5 radiculopathy. The doctor attributed claimant's hip and back symptoms to the right knee injury. According to Dr. Murati, claimant has a 13 percent whole body functional impairment under the fourth edition of the AMA *Guides*.

Judge Barnes appointed Dr. Jahnke to provide an independent medical evaluation. Dr. Jahnke examined claimant in February 2000 and diagnosed, among other things, bilateral sacroiliitis with piriformis syndrome, muscle imbalance of the bilateral lower extremities, bilateral greater trochanteric bursitis and depression. The doctor indicated in his February 23, 2000 report that it was conceivable that the sacroiliitis and muscle

imbalance resulted from an altered gait that was caused by the right knee injury. In a June 6, 2000 letter to attorney [P.] Kelly Donley, Dr. Jahnke rated claimant's whole body functional impairment at 10 percent.

The Board is aware that Dr. Robert Eyster, who treated and operated on claimant's right knee, did not relate claimant's back symptoms to the right knee injury. But Dr. Eyster did not recall that claimant ever voiced hip or back complaints and his office notes did not mention those complaints despite the fact that claimant introduced a tape-recording made in September 1998 in which she advised the doctor's assistant of groin and hip symptoms. The Board is also mindful that Dr. Philip Mills diagnosed claimant as having trochanteric bursitis and low back pain but he could not relate those conditions to the right knee injury. But Dr. Mills did testify that his opinion would change if claimant had informed Dr. Eyster of the hip and back complaints within two months of the accident.

When considering all of the medical evidence, along with claimant's testimony, the Board finds that the hip and back conditions are a direct consequence of the June 27, 1998 accident.

4. The Board affirms the Judge's findings and conclusions that for purposes of the permanent partial general disability formula claimant had a 100 percent wage loss through October 2, 2000, and that a $91 per week post-injury wage should be imputed creating a 68 percent wage loss after that date. The Board also finds that claimant has sustained a 42 percent task loss as a result of the June 1998 accident and resulting injuries.

Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against a work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon an ability to earn rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

The Board finds and concludes that claimant did make a good faith effort to find work following her injury through the date of the regular hearing and through October 2, 2000. At the June 7, 2000 regular hearing, claimant introduced a lengthy list of potential employers that she contacted from February 1999 through May 2000 and testified that she was still looking for work.

But claimant quit or refused to perform a part-time job provided by respondent that would have paid claimant $91 per week monitoring telephone calls from her home on weekends. The Board concludes that quitting the part-time job was not in good faith and, therefore, a post-injury wage should be imputed commencing October 3, 2000, as that is the approximate date that claimant began avoiding respondent's attempts to contact her. Therefore, the Board concludes that a post-injury wage of $91 per week should be imputed commencing October 3, 2000.

For purposes of the wage loss prong in the permanent partial general disability formula, the Board finds that claimant had a 100 percent wage loss through October 2, 2000, and a 68 percent wage loss (comparing the imputed $91 per week to the stipulated $286.46 average weekly wage) after that date.

5. The Board modifies the Judge's finding that claimant has a 45 percent task loss. The Judge found that claimant's task loss should be determined considering the percentages provided by Doctors Brewer, Brown and Murati. The Judge does not indicate

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Copeland*, p. 320.

in the Award how the 45 percent task loss was derived. But it appears the Judge averaged the percentages provided by the three doctors and made a mathematical error. The Board finds that according to both Dr. Brewer and Dr. Murati, claimant is unable to perform 30 of 62, or approximately 48 percent, of her former work tasks. The Board also finds that according to Dr. Brown, claimant is unable to perform 18 of 62, or approximately 29 percent, of her former work tasks. Averaging those three percentages yields a 42 percent task loss, which should be used in calculating claimant's permanent partial general disability.

6. Averaging claimant's percentages of wage loss with the 42 percent task loss, the Board finds that claimant has a 71 percent work disability for the period through October 2, 2000, and a 55 percent work disability for the period following that date. In the event claimant obtains, or has obtained, employment after October 2, 2000, the parties may seek review and modification.

7. The Board affirms the Judge's finding that the medical services rendered by Dr. Brewer were unauthorized. Claimant, knowing that Dr. Eyster was her authorized doctor, sought Dr. Brewer's services without approval from respondent or its insurance carrier. Therefore, Dr. Brewer's services are subject to the $500 limit for unauthorized medical treatment.[6]

8. Respondent and its insurance carrier have argued that claimant failed to make a good faith effort to obtain employment and, therefore, her permanent partial general disability award should be limited to functional impairment or, at a minimum, by not using her actual earnings for the wage loss prong of the work disability formula. But, as in many claims that come before the Board, it appears that respondent and its insurance carrier were willing to pay a vocational expert to perform an assessment of claimant's wage earning abilities for purposes of litigation only and to testify against the claimant rather than to provide claimant with any assistance in finding other employment. Had vocational services been provided, claimant may have succeeded in finding suitable full-time employment, which would have limited the benefits awarded.

9. Claimant's attorney is reminded that the facts cited in a brief filed with the Board should reference their source. Without such reference, the brief's usefulness is limited.

10. The Board adopts the findings and conclusions set forth by Judge Barnes in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the January 9, 2001 Award, as follows:

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[6] See K.S.A. 1997 Supp. 44-510(c)(2).

Cheryl Thatcher is granted compensation from Nursefinders and its insurance carrier for a June 27, 1998 accident and resulting disability. Based upon an average weekly wage of $286.46, Ms. Thatcher is entitled to receive 22.88 weeks of temporary total disability benefits at $190.98 per week, or $4,369.62.

For the period from December 5, 1998 through October 2, 2000, 95.43 weeks of benefits are due at $190.98 per week, or $18,225.22, for a 71 percent permanent partial general disability.

For the period commencing October 3, 2000, 128.49 weeks of benefits are due at $190.98 per week, or $24,539.02, for a 55 percent permanent partial general disability and a total award of $47,133.86.

As of August 30, 2001, claimant is entitled to receive 22.88 weeks of temporary total disability compensation at $190.98 per week, or $4,369.62, plus 142.86 weeks of permanent partial general disability compensation at $190.98 per week, or $27,283.40, for a total due and owing of $31,653.02, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $15,480.84 shall be paid at $190.98 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Wichita, KS
Richard J. Liby, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director